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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VAN A. PENA, PHD., M.D.,

10 **Plaintiff,**

11 **v.**

12 **TIMOTHY MEEKER, et al.,**

13 **Defendants.**

S CASE NO. C 00-4009 CW
S PLAINTIFF'S PROPOSED RESPONSE
S TO JURY QUESTIONS (11/24/09, 2:12
S PM)
S Trial Date: November 16, 2009
S Pretrial Conference: October 29, 2009
S Time: 10:00 a.m.
S Courtroom: 2
S The Honorable Claudia Wilken

16 In response to the questions posed by the jury on November 24, 2009 at 2:12 p.m.. Plaintiff
17 proposes the following responses. In support thereof, the Plaintiff would show the Court the
18 following:

19 1. The parties met and conferred concerning the questions posed by the jury, but could
20 not agree upon a joint proposal as to what response should be given.

21 2. Plaintiff proposes the following responses in the order of Plaintiff's preference,
22 subject to approval of the Court.

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24 **OPTION NO. 1:**

25 No.

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27 **COMMENT:** Plaintiff's recommends this response as the clearest and least confusing. However,

1 should the Court conclude that further explanation is necessary, Plaintiff provides the Court with two
2 additional responses.

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4 OPTION NO. 2

5 Not necessarily. What you are being asked to decide is whether Dr. Bjorndal fired Dr. Pena
6 for the reasons that she gave at the time she fired him or whether her true motivation was to retaliate
7 against Dr. Pena for engaging in conduct protected by the First Amendment, i.e. photographing
8 patients or filing a previous lawsuit. If you conclude that that Dr. Pena has proven that it is more
9 likely than not that some or all of the reasons Dr. Bjorndal gave for Dr. Pena's termination are false
10 or pretextual, you may, but are not required, to conclude that Dr. Bjorndal's true motivation was
11 retaliation for Dr. Pena's protected activity.

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13 COMMENT: This second option is based directly upon the jury instructions previously given to the
14 jury and *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003), which expressly states that
15 there are "three ways in which a plaintiff can show that retaliation was a substantial or motivating
16 factor behind a defendant's adverse employment actions. [...] **Third, the plaintiff can introduce**
17 **evidence that his employer's proffered explanations for the adverse employment action were**
18 **false and pre-textual.**" The *Coszalter* court went on to explain that one falsely asserted reason can
19 "casts doubt on other explanations that, standing alone, might appear to be true." *Id* at 978.

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21 OPTION NO. 3

22 Not necessarily. What you are being asked to decide is whether Dr. Bjorndal fired Dr. Pena
23 for the reasons that she gave at the time she fired him or whether her true motivation was to retaliate
24 against Dr. Pena for engaging in conduct protected by the First Amendment, i.e. photographing
25 patients or filing a previous lawsuit. If you conclude that that Dr. Pena has proven that it is more
26 likely than not that some or all of the reasons Dr. Bjorndal gave for Dr. Pena's termination are false
27 or pretextual, you may, but are not required, to conclude that Dr. Bjorndal's true motivation was

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1 retaliation for Dr.Pena's protected activity. If you conclude that Dr. Pena's protected activity was
 2 a substantial or motivating factor for his termination, Dr. Bjorndal may avoid liability only if you
 3 conclude that she has proven that it is more likely than not that she had a non-retaliatory reason to
 4 fire Dr. Pena and that she would have fired him for that non-retaliatory reason, despite his protected
 5 activity.

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7 COMMENT: Plaintiff originally included the final sentence referencing Defendant's affirmative
 8 defense out of a sense of fairness and completeness, but opposing counsel objected to its inclusion.

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10 **AUTHORITY FOR OPTIONS NO 1 & 2:**

11 There are "three ways in which a plaintiff can show that retaliation was a substantial or
 12 motivating factor behind a defendant's adverse employment actions. [...] **Third, the plaintiff can**
 13 **introduce evidence that his employer's proffered explanations for the adverse employment**
 14 **action were false and pre-textual.**" *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir.
 15 2003)(emphasis added).

16 Moreover, "A reasonable fact finder could also find that a pretextual explanation such as this
 17 one casts doubt on other explanations that, standing alone, might appear to be true." *Coszalter*,
 18 *supra*, 320 F.3d at 978.

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20 **RESPECTFULLY SUBMITTED,**

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22 **Dated: November 29, 2009**

LAW OFFICES OF LAWRENCE J. KING

23

By: _____/s/

24 **LAWRENCE J. KING**
 25 **Attorney for Plaintiff**
 26 **Van A. Pena, M.D., Ph.D.**

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